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## Monitoring Inmate-Attorney Communications: Sixth Amendment Implications

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### Summary

Citing the need to ensure that individuals in federal custody are not able to facilitate acts of terrorism through conversations with an attorney, the Department of Justice's Bureau of Prisons instituted an interim rule on October 30, 2001, authorizing the monitoring of attorney-client communications when the Attorney General determines that reasonable suspicion exists to believe that such communications might facilitate acts of violence or terrorism. This report provides an overview of the provisions of the interim rule, as well as a brief synopsis of Sixth Amendment implications regarding intentional intrusion into the attorney-client relationship.

On October 31, 2001, the Department of Justice's Bureau of Prisons published an interim rule in the Federal Register, effective October 30, 2001: (1) altering regulations regarding the imposition of "special administrative measures" designed to prevent the dissemination of information by certain inmates that could endanger national security or lead to acts of violence and terrorism; and (2) authorizing the monitoring of attorney-client communications, subject to specific procedural safeguards, upon certification by the Attorney General that reasonable suspicion exists to believe that an inmate may use such communications to further or facilitate acts of violence or terrorism.<sup>1</sup>

### Overview of the Interim Rule

The interim rule makes several changes to provisions in the Code of Federal Regulations authorizing the imposition of "special administrative measures with respect to specified inmates," upon certification by senior intelligence or law enforcement officials that such measures were necessary to prevent the dissemination of classified information that could endanger national security (28 C.F.R. §501.2) or other information that could

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<sup>1</sup> 66 FR 55062, Oct. 31, 2001.

facilitate acts of violence and terrorism (28 C.F.R. §501.3).<sup>2</sup> These special administrative measures can include housing the inmate in administrative detention, limiting correspondence and visitation, media interviews and use of the telephone, to the extent such limitations are “reasonably necessary.” Regarding the potential disclosure of classified information that could threaten national security, the interim rule extends the initial period of time such measures may be imposed from a period of 120 days to a period up to one year, as designated by the Director of the Bureau of Prisons. Also, whereas the original regulation allowed for 120 day extensions of special administrative measures upon certification that the factors identified in the original certification continued to exist, the interim rule allows the Director to extend the period for imposition of such measures in increments of up to one year upon a subsequent certification that there is a danger of disclosure.<sup>3</sup> Relatedly, the interim rule extends the initial imposition period applicable for the prevention of acts of violence and terrorism from 120 days to a period of up to one year. Likewise, the interim rule alters the extension period from 120 days to periods of up to one year, upon subsequent certification that the inmate’s communications could result in harm.<sup>4</sup>

Most significantly, the interim rule adds a new provision to §501.3 authorizing the monitoring or review of communications between an inmate and his or her attorneys in “any case where the Attorney General orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”<sup>5</sup> The interim rule establishes that absent prior court authorization, the Director of the Bureau of Prisons is required to provide written notice to the inmate and attorneys involved prior to the initiation of any monitoring or review.<sup>6</sup> Also, the interim rule provides that the BOP Director, with the approval of the Assistant Attorney General for the Criminal Division, “shall employ procedures to ensure that all attorney-client communications are reviewed for privilege claims” and that any privileged material not be retained during the course of the monitoring.

In an effort to protect the attorney-client privilege and “to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or defense strategy,” the interim rule provides for the designation of a “privilege team” comprised of individuals not involved in the underlying investigation to monitor communications. Finally, the interim rule provides that the privilege team may not disclose any information obtained during monitoring “unless and until” the disclosure has been approved by a federal judge, except in instances where the head of the team

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<sup>2</sup> *Id.* at 55062. The interim rule also expands the definition of inmate to include “all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.” 28 C.F.R. §500.1(c).

<sup>3</sup> 66 FR 55062, 55065.

<sup>4</sup> *Id.* at 55063, 55065-66.

<sup>5</sup> *Id.* at 55066.

<sup>6</sup> *Id.* at 55066; §501.3(d)(2).

determines that the information obtained indicates that an act of violence or terrorism is imminent.<sup>7</sup>

## Sixth Amendment Implications

The Sixth Amendment to the Constitution of the United States provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.”<sup>8</sup> While the “fundamental justification” for this provision is the general inability of a criminal defendant to make “informed choices about the preparation and conduct of his defense,” the Sixth Amendment has also been held to guarantee the privacy of communications with counsel, as “[f]ree two way communication between client and attorney is essential if the professional assistance guaranteed by the Sixth Amendment is to be meaningful.”<sup>9</sup> Accordingly, this maxim raises the question of whether the monitoring of attorney-client communications as provided for in the interim rule could constitute an impermissible intrusion into the attorney-client relationship, endangering an individual’s right to effective assistance of counsel.

**A. Intrusion Upon Attorney-Client Communications.** In *Weatherford v. Bursey*, the Supreme Court addressed Sixth Amendment concerns surrounding governmental intrusion into the attorney-client relationship.<sup>10</sup> In *Weatherford*, an undercover law enforcement agent (Weatherford) was arrested and indicted with the defendant, Bursey, in order to protect Weatherford’s undercover status. In an effort to obtain information helpful to Bursey’s defense, Bursey and his counsel invited Weatherford to participate in attorney-client meetings. Still wishing to maintain his undercover status, Weatherford participated in two such meetings but did not convey any information regarding trial plans or strategy to his superiors or the prosecuting attorney or his staff.<sup>11</sup> Weatherford subsequently testified for the prosecution at Bursey’s trial, but did not make any reference to the attorney-client meetings. Upon his conviction, Bursey sued Weatherford under 42 U.S.C. §1983, alleging that Weatherford had communicated defense strategies and plans to the prosecution, depriving Bursey of his right to effective assistance of counsel. The district court rejected this argument, finding that Weatherford had in fact not discussed or made available “any details or information regarding the plaintiff’s trial plans, strategy, or anything having to do with the criminal action pending against the plaintiff.”<sup>12</sup>

The Court of Appeals for the Fourth Circuit reversed, imposing a rule that “whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a

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<sup>7</sup> *Id.* at 55066; §501.3(d)(3).

<sup>8</sup> U.S. Const., Amdt. VI.

<sup>9</sup> *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978); *see also, United States v. Rosner*, 485 F.2d 1213, 1224 (2<sup>nd</sup> Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) (“the essence of the Sixth Amendment right...is privacy of communication with counsel.”).

<sup>10</sup> *Weatherford v. Bursey*, 429 U.S. 545 (1977).

<sup>11</sup> *Id.* at 548.

<sup>12</sup> *Id.* at 548.

new trial.”<sup>13</sup> The Supreme Court reversed this holding, determining that there had been no violation of the Sixth Amendment. While acknowledging that the privacy of attorney-client communications is important for the meaningful realization of the Sixth Amendment’s guarantee of effective assistance of counsel, the Court found it significant that the government had not made the intrusion in bad faith and had not obtained any improper information.<sup>14</sup> Accordingly, the Court held: “[t]here being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment....”<sup>15</sup>

A particularly pertinent aspect of the *Weatherford* decision as it relates to the present scenario was the Court’s determination that the government had a legitimate interest in maintaining the agent’s undercover status, thereby justifying his presence at meetings between the defendant and his attorney.<sup>16</sup> Subsequent to *Weatherford*, the lower courts have continued to uphold governmental intrusions necessitated by legitimate law enforcement interests.<sup>17</sup> Furthermore, in *United States v. Mastroianni*, the Court of Appeals for the First Circuit indicated that the government could intrude into the attorney-client relationship upon establishing a “substantial record” that there is a possibility of criminal activity.<sup>18</sup> Based upon these factors, it is arguable that the interim rule’s requirement that there be a “reasonable suspicion” of potential terrorist activity could be interpreted as sufficient to establish a legitimate governmental interest in monitoring the communications of certain individuals.

Furthermore, the effective operation of “privilege teams” as provided for in the interim rule might serve to obviate judicial concerns regarding the potential of prejudice that arises from governmental intrusion into the attorney-client relationship. Specifically, courts deciding intrusion cases subsequent to *Weatherford* have established different standards regarding which party bears the burden of establishing the absence or existence of prejudice.

In *United States v. Steele*, for instance, the Court of Appeals for the Sixth Circuit determined that “even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.”<sup>19</sup> Upon determining that a governmental informant who had intruded upon defense preparations had not divulged any information obtained from the conferences, the court held that there was no indication that the defendant was “denied effective assistance

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<sup>13</sup> *Id.* at 549 (quoting *Bursey v. Weatherford*, 528 F.2d 483, 486 (4<sup>th</sup> Cir. 1975)).

<sup>14</sup> *Id.* at 557-558.

<sup>15</sup> *Id.* at 558.

<sup>16</sup> *Id.* at 557.

<sup>17</sup> See *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984); *United States v. Singer*, 785 F.2d 228, 232 (8<sup>th</sup> Cir. 1986).

<sup>18</sup> *United States v. Mastroianni*, 749 F.2d 900, 905-906 (1<sup>st</sup> Cir. 1984).

<sup>19</sup> *United States v. Steele*, 727 F.2d 580, 586 (6<sup>th</sup> Cir. 1984).

of counsel.”<sup>20</sup> Under this approach, a privilege team operating effectively pursuant to the interim rule might persuade a reviewing court to determine that the monitoring is presumptively valid, absent an indication of improper disclosure of privileged information. Relatedly, in the event of such a disclosure, this approach might lead a court to require a showing of prejudice prior to finding a Sixth Amendment violation.

Conversely, other courts have held that a *per se* violation occurs in instances where there is an intrusion into the attorney-client relationship that results in the disclosure of information to the prosecution, irrespective of a finding of prejudice. In *United States v. Levy*, for example, the Court of Appeals for the Third Circuit held that “the inquiry into prejudice must stop at the point where attorney-client confidences are actually exposed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.”<sup>21</sup> Similarly, in *Schillinger v. Haworth*, the Court of Appeals for the Tenth Circuit held that there was no need to determine whether a governmental intrusion resulting in the disclosure of information to the prosecution was prejudicial to the defendant, as such “purposeful intrusion on the attorney-client relationship strikes at the center of protections afforded by the Sixth Amendment.”<sup>22</sup> Under this standard, it would appear that while secure monitoring by a privilege team might garner court approval, any indication of improper disclosure could result in an automatic determination that the Sixth Amendment had been violated.

In light of the aforementioned factors, it would appear that *Weatherford* and subsequent cases requiring the demonstration of prejudice prior to establishing a Sixth Amendment violation may lend credence to the notion that the government may monitor attorney client communications, so long as there is a justification for the intrusion, and the information obtained is not used to the prosecution’s advantage in its case. However, it may likewise be argued that the legal rationales discussed above do not support such a conclusion, given that they do not appear to contemplate the Sixth Amendment implications of systematic monitoring.

**B. The “Chilling Effect” of Systematic Monitoring.** It is important to note that the aforementioned cases address discrete instances of governmental intrusion into the attorney-client relationship. Even in situations where an intentional intrusion was upheld, the intrusion was of a temporary nature, with the focus of the judicial inquiry centering on whether the intrusion resulted in the production of information that was prejudicial to the defense. While the holdings in these cases may be cited for the proposition that governmental intrusions are not inherently violative of the Sixth Amendment, they shed little light on the concern that pervasive monitoring of attorney-client communications will have a chilling effect on the full and open consideration of the legal options available to a covered inmate.

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<sup>20</sup> *Steele*, 727 F.2d at 587.

<sup>21</sup> *Levy*, 577 F.2d at 209.

<sup>22</sup> *Schillinger v. Haworth*, 70 F.3d 1132, 1141 (10<sup>th</sup> Cir. 1995).

As such, the calculus traditionally employed by the courts to identify whether a particular intrusion constitutes a Sixth Amendment violation would not appear to be fully applicable to the present scenario. There do not appear to have been any cases that directly address the Sixth Amendment implications of the type of monitoring authorized by the interim rule. There is indication, however, that courts may be hesitant to allow such pervasive monitoring, given its potentially chilling effect on the attorney-client relationship.

In *Weatherford*, for instance, the Supreme Court noted the government's acknowledgment that "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."<sup>23</sup> The Court went on to state that "[o]ne threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard."<sup>24</sup> Furthermore, the Court of Appeals for the Seventh Circuit, explaining the importance of privacy in attorney-client communications, has indicated that systematic monitoring of such communications could raise potentially fatal Sixth Amendment concerns. Specifically, in *United States v. DiDomenico*, the court addressed at length the hypothetical implementation of a governmental policy to tape all conversations between criminal defendants and their lawyers for archival purposes, without turning them over to the prosecution.<sup>25</sup> The court opined that such systematic monitoring of attorney-client communications would violate the Sixth Amendment, as the knowledge of continuous surveillance would inhibit a client's willingness to engage in open and full discussion with his or her attorney.<sup>26</sup> Applying these considerations to the interim rule, it is possible that a reviewing court would determine that an inmate's privacy interests are not protected sufficiently. Specifically, while the application of procedural safeguards such as the use of a "taint team" could mitigate judicial concern regarding the impermissible disclosure of privileged information to the prosecution, it is possible that a reviewing court would find such measures to be of little value in ameliorating the chilling effect on attorney-client communications that is likely to arise upon application of the interim rule.

These factors, viewed in relation to *Weatherford* and its progeny, indicate that reviewing courts may reach different conclusions regarding the Sixth Amendment validity of the monitoring plan as implemented in the interim rule.

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<sup>23</sup> *Weatherford*, 429 U.S. at 554, n. 4 (quoting Brief for United States in *Hoffa v. United States*, O.T. 1966, No. 32, p. 71, quoted in Brief for United States as *Amicus Curiae* in *Weatherford v. Bursey*, 429 U.S. 545, p. 24, n. 13).

<sup>24</sup> *Weatherford*, 429 U.S. at 554-555, n. 4.

<sup>25</sup> *United States v. DiDomenico*, 78 F.3d 294 (7<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996).

<sup>26</sup> *Id.* at 299. The court stated that such a practice "would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication)."

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